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Medical Evidence and Testimony

Robert V. Lamppert

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MEDICINE'S ROLE in legal proceedings is an interesting and often perplexing area.[1] In the last three decades the fields of personal injury, workmen's compensation, and malpractice litigation have seen tremendous growth and many complex changes.[2] During the 1930's the incidence of malpractice claims increased tenfold.[3] Over 2,000,000 industrial accidents occur annually, resulting in 18,000 deaths and 100,000 permanent injuries. In addition, automobile, railroad, shipping, home, and other accidents total 7,000,000 accidents annually, of which 70,000 are fatal.[4] The art of successfully carrying on litigation in these areas has grown into an intricate procedure requiring detailed preparation, highly skilled participants, and an ever watchful eye for new developments.[5]

Roles played by the medical profession in this growth have been primarily along two main avenues. One role has been to provide information and offer professional opinions regarding the extent of injury in personal injury and workmen's compensation litigation.[6] The other role is that of defendant in malpractice litigation. These two areas have been sources of extreme concern to both the medical and legal professions. There has been much confusion and misunderstanding between the fields of medicine and law in regard to these areas, and much has been written and spoken about the problems involved.

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1 An excellent over-all analysis: Medical-legal Problems and their Solutions, 165 J. A. M. A. 699 (Oct. 12, 1957).

2 Medico-legal Problems in Personal Injury Actions, 24 Tenn. L. R. 415 (Jan., 1956).

3 Regan, Malpractice, an Occupational Hazard, 156 J. A. M. A. 14 (Dec. 14, 1954).

4 Horovitz, NACCA and Its Objectives, 10 NACCA L. J. 17 (1952).

5 Belli, The Use of Demonstrative Evidence in Achieving the More Adequate Award (1951). Grubb, Presenting Scientific Proof, 23 Wis. B. Bull. 9 (1950). Sessions, The Short Course in "Legal Medicine and Elements of Medicolegal Litigation," 25 Tulane L. R. 353 (1951). Smith, Components of Proof in Legal Proceedings, 51 Yale L. J. 537 (1942).

6 Expert and Technical Testimony, U. Mich. Inst. of Industrial Health and School of Public Health, Continued Education Series, No. 53 (Oct. 21, 1953).

Purpose

It is the purpose of this article to explain the various ways in which medicine becomes involved in the law and to point out the problems and difficulties involved. Since this article is written for both medical doctors and attorneys, the detailed explanations and terminology of each profession will necessarily be kept at a basic level. It is hoped that a forthright demonstration of the basic factors involved, along with an attempt to explain the problems complicating the points of controversy and misunderstanding, will help somewhat in creating a better understanding between the two professions and enable them to better serve the public in these areas of mutual concern.

Every lawyer and most doctors are familiar with the basic make-up and procedure of the typical personal injury or malpractice lawsuit and the various parties involved.

Role of the Judge

It is common knowledge that the judge plays the role of "referee" and "decider of the law" in the typical lawsuit. In recent years he also has played a key role in pre-trial hearings and settlement attempts.[7] In the medicolegal area the judge's problems are often very complex. He may have to rule on the admissibility of controversial evidence of which he has a limited understanding. He must control the testimony of the expert witness with extreme caution, since the jury will often be entirely dependent on this testimony in evaluating important aspects of the evidence. It is a difficult task at best for the judge, a layman in the field of medicine, to properly incorporate complex medical testimony into his charge to the jury.

Control of counsel during the trial is also very important. Personal injury lawyers often use emotion as an important influence on the jury. Tempers frequently flare between opposing counsel at critical stages during the trial. What the judge says and how he rules during these tense situations has a profound effect on the minds of the lay jury.

Role of the Jury

The jury is the "prime mover" in most personal injury lawsuits—the trier of the facts. Attorneys usually feel confident of the law applicable in their action, but how the jury will decide

[7] Evaluation of a Personal Injury Case for Settlement Purposes, 23 Ins. Counsel J. 261 (July, 1956).

the facts is a large and often expensive question mark. The jury alone must decide whom to believe and whom not to believe. Preparation of a personal injury lawsuit is usually a complex and arduous undertaking, but if the trial lawyer fails to convince the jury of the merits of his case, all the preparatory efforts have been wasted.

Trial by jury has, over the years, been one of the basic tenets of the law. Legal literature is rich in its various attributes and deficiencies. The remarkable observation to be made is that this group of laymen, with little or no prior experience, does so remarkably well in attempting to arrive at just verdicts. However, the complexities of the evidence in many of today's trials tax the analytical ability of the juror to an unreasonable degree. This is especially true in the situation where experts testifying for opposing sides of a lawsuit present conflicting, highly technical testimony. Much has been said and done in attempting to alleviate this condition, but it remains a serious problem of the modern day jury system.[8]

Role of Counsel

Each attorney representing a party in a lawsuit is an advocate. He has decided on a course of action for his client and is in the process of pursuing that course at the trial.[9] It is the ethical obligation and duty of every attorney to present his client's case to the best of his ability, within the limits of the law.[10] Furthermore, it is his duty to attack the position of his adversary with every legal means at hand.[11]

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[8] Perrin, What Goes on in the Minds of Malpractice Jurors, 36 Med. Economics 109 (Feb. 2, 1959). Note, Opinion Testimony "Invading the Province of the Jury," 20 U. Cin. L. R. 484 (1951). Nowell, Invasion of the Province of the Jury, 31 Tex. L. R. 731 (1953).

[9] Gair & Cutler, Negligence Cases: Winning Strategy (1957). Biskind, How to Prepare a Case for Trial (1954). Magarick, Successful Handling of Casualty Claims (1955). Oleck, Negligence Investigation Manual (1953); Damages to Persons & Property (1957 rev.). Spellman, How to Prove a Prima Facie Case (3rd ed., 1954). Osborn, The Problem of Proof (1946). Goldstein, Trial Technique (1935). Schweitzer, Cyclopedia of Trial Practice (1954). Belli, Modern Trials (1954). Conference on Trial Tactics, 5 Syracuse U. College of L. 163 (1953).

[10] Gair, Medico-legal Trial Technique From the Standpoint of the Plaintiff, 31 Tex. L. R. 707 (1953). Berman, Medico-legal Trial Technique From the Defendant's Point of View, 31 Tex. L. R. 724 (1953).

[11] Wellman, Art of Cross-Examination (4th ed., 1936). Cutler, Successful Trial Tactics (1949). Romanatha & Mathrubutham, Cross-Examination; Principles and Precedents (1953). Soonavala, Advocacy (1953). Keeton, Trial Tactics & Methods (1954). Clark, Preparation of Cross-Examination (N. Y. P. L. I. series. 1948). Gallagher, Technique of Cross-Examination (N. Y. P. L. I. series, 1948).

The above is the point of greatest confusion to non-legal minds. It is sometimes difficult for a jury to understand that counsel in the throes of violent cross-examination of a witness is merely performing a duty he is ethically obligated to perform—to tear down the story of the opposing witness to the best of his ability. Medical experts on the witness stand, even seasoned veterans at the art of testifying in court, rebel at the tactics of cross-examination.[12] Medical doctors have been trained for life that they are to help, assist, and cooperate in every way with fellow personnel in their profession. Here the medical doctor is exposed to a situation where the opposite appears to be true. The opposing counsel, who the doctor understands is of the same profession as the attorney who asked him to testify, often attacks the doctor's story with such vehemence and disdain that it seems obvious that the cross-examiner thinks the doctor is a liar and an incompetent. Even if he has been forewarned of this experience, it is often difficult to remain calm and unaffected in this adversary proceeding so foreign to the basic tenets of medical training in which he has spent his lifetime.[13]

Not all cross-examinations are this ardent. Many witnesses are let off by a simple "no questions" by the cross-examiner. Counsel will only pursue a course of cross-examination if he feels that it will serve some purpose for his client's cause. To forcefully cross-examine the kind, friendly, little old family doctor without a definite purpose in mind is often fatal to the cause of the cross-examiner.

However, regardless of the problems involved in this area, it remains a fundamental principle of advocacy that cross-examination is the most perfect method yet devised by man to ascertain the ultimate truth.

Limits to which counsel may legally and ethically go in advocating the cause of his client are not easily outlined.[14] Frequently the legal conscience of the attorney is the deciding factor. Often the performance of the opposing attorney will dictate a course of action. Codes of ethics, volumes of case law and statutory law, and the attorney's own background help determine how far he will go in pursuit of his client's cause.

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[12] Goldstein, Cross-Examination of Medical Experts, 3 Med., Tr. T. Q. 123 (Sept., 1956).

[13] Shindell, Medicine Versus Law: A Proposal of Settlement, 151 J. A. M. A. 1078 (Mar. 28, 1953).

[14] Lake, How to Win Lawsuits Before Juries (1954).

Ethics are a question both in the court and outside the court. Everyone is aware of the stories of ambulance chasing, of the manufacturing of false or fraudulent evidence, of illegal tactics of opposing counsel both in and out of court, etc. Fortunately most of these stories are exaggerations or falsehoods. Some, however, are not. The important consideration for purposes of this discussion is that in the heat of "legal battle" an advocate will use every legitimate means at his disposal to further the cause of his client—and this is as it should be. The client has every right to expect this full and unstinted effort on the part of his advocate. It is a fundamental theory of the law that where two competent advocates come to grips justice will be done and right will prevail. Ideally this is true; practically there are problems. Opposing counsel often will go "just one step further" in order to prove a point or in order to gain a certain advantage. It is not the duty of counsel to disclose the weak parts of his client's case to the opposition. How far counsel may go in protecting his client's interests or in developing his client's case is a difficult and complex problem. The answers lie in the law schools, bar associations, courts, and legislatures. Setting up and enforcing rules and regulations of conduct are for these agencies. The important thing for the "legal layman" to remember is that these areas of potential controversy exist. A cross-examination is not necessarily unfair just because it causes the witness to lose his temper. Failure to disclose information detrimental to his client's cause is not normally considered a breach of legal ethics. These are fundamental legal principles and should be recognized as such by individuals both in and out of the legal profession.

In most lawsuits which come to trial there are certain key issues which have prevented prior settlement. There may be a close question of negligence on the part of the defendant. There may be an issue of possible contributory negligence on the part of the plaintiff which would bar his recovery. Often there is disagreement as to the extent and damages value of the injuries sustained by the plaintiff. These and other basic differences of opinion prevent counsel and parties from arriving at a pre-trial settlement and are usually the main points of controversy at the subsequent trial. Each advocate will use his legal talents to the fullest extent to shade a controversial point in favor of his client. Again it behooves the "legal layman" to look for these key points of disagreement, for here is often where the crux of the matter lies.

Plaintiff's Counsel

The fundamental objectives of counsel will determine his approach. Plaintiff's counsel has the problem of proving his client's case by a greater weight of the evidence.[15] This advocate must therefore take the offensive—he must establish a case for his client or the cause will fail.[16]

In the past three decades a talented group of plaintiff's attorneys have developed throughout the country. Certain firms have acquired a reputation for successful plaintiff's litigation, and many clients and much referral work are attracted by these firms. These firms develop highly skilled lawyers and large staffs which prepare cases to the last detail. A large percentage of cases is still tried by the attorney who practices general law but the trend seems to be to the contrary. The skilled specialist, in the law as well as in medicine, seems to be on the increase.[17]

An important point to recall is that usually the plaintiff's attorney will collect a fee only if he wins his case, and his fee will usually be determined by how much he can recover for his client. This fee is determined in a contingent fee contract and ranges from twenty-five to fifty per cent of the recovery. How much this factor influences the course of conduct of the plaintiff's counsel is a question to be carefully considered.

Defendant's Counsel

Counsel for the defense usually is a law firm which represents several insurance companies.[18] Specialization seems to be the trend in this field also. Skilled trial attorneys develop fine techniques from numerous personal injury trials, pretrials, and negotiations.[19] Again, large staffs prepare the complex details of each case.

Defense counsel's fee is not contingent upon the outcome of the case but is usually for a predetermined rate. The defense attorney's incentive to win is not influenced by a contingent fee contract. Since his fee usually is on a time and expense basis, some say that this encourages protracted negotiation on his part.

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15 Richardson, Objectives, Problems, and Methods of Plaintiffs' Counsel in Personal Injury Litigation, 31 Tex. L. R. 660 (1953).

16 Dudnik, Prepare Your Plaintiff for Direct Testimony, 6 Clev.-Mar. L. R. 256 (1957).

17 Richardson, *op. cit. supra* n. 15.

18 Gresham, Objectives, Problems, and Methods of Defense Counsel in Personal Injury Litigation, 31 Tex. L. R. 696 (1953).

19 Pierson, The Defense Attorney and Basic Defense Tactics (1956).

Defense counsel's most important job is to break down the case presented by the plaintiff. This often requires painstaking effort since many times proof of injury will rest solely on the plaintiff's subjective complaints. There is a natural inclination on the part of juries to want to help an injured party. It is fairly common knowledge that most real defendants are in fact insurance companies with large assets rather than individuals who might be seriously harmed by a high verdict.

Medical Experts

In almost every personal injury litigation counsel must introduce expert medical testimony to support or refute the alleged injury.[20] Most other facts in the lawsuit can at least be understood by the jury. The medical evidence often requires explanation and clarification on the part of the medical expert.[21]

The important fact to remember in the use of medical experts in a lawsuit is that there are usually medical experts for each side, and they often disagree as to the existence, extent, and/or causation of alleged injuries. It is important to understand the implications of these seemingly diametrically opposed professional viewpoints.

Initially, the parties probably wouldn't be in court if they agreed on the extent and cause of injuries and if there were no other issues potentially fatal to the plaintiff's cause. Defense counsel would long since have made an attempt to settle the case. Only where the parties are too far apart on a settlement figure would a case such as this ordinarily get to the trial stage.

Counsel having the patient examined will often supply information to the doctor slanted to his side of the case, and, there-

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[20] McCormick, Some Observations Upon the Opinion Rule and Expert Testimony, 23 Tex. L. R. 109 (1945). Tyner, Medico-legal Testimony: The Expert Witness, 44 Tex. St. J. Med. 326 (1948). Hertzler, The Horse and Buggy Doctor (1938). McCormick, Science, Experts and the Courts, 29 Tex. L. R. 611 (1951). Smith, Scientific Proof and Relations of Law and Medicine, 18 Ann. Int. Med. 450 (1943). Stetler, You, Doctor, Will Be a Witness, 33 Dicta 348 (Nov.-Dec., 1956). Flynn, Doctor on the Witness Stand, 86 Med. Times 245 (Manhasset, L. I., N. Y., Feb., 1958). Friedman, The Physician, the Textbook, and the Law, 85 Med. Times 1408 (Manhasset, L. I., N. Y., Dec., 1957). Killinger, The Doctor Goes to Court, Need for a New Order, 43 J. Florida M. Ass. 1193 (June, 1957). Stetler, The Medical Witness, 53 W. Va. M. J. 154 (Apr., 1957). Sands, The Doctor as a Witness in Court, 57 N. Y. State J. M. 284 (Jan. 15, 1957).

[21] Barton, Preparation of Medical Reports in Personal Injury Cases, 47 J. Maine M. Ass. 299 (Oct., 1956). Miles, The Medical Case History in the Courtroom, 53 J. M. Soc. N. Jersey 463 (Sept., 1956). Hospital Records: Limitations on Admissibility, 165 J. A. M. A. 847 (Oct. 19, 1957). Hospital Record—Its Significance in Personal Injury Actions, 28 N. Y. S. Bar Bull. 385 (Dec., 1956).

fore, each physician may receive an oppositely weighted history of the alleged injury and other pertinent facts. Since a major portion of a medical diagnosis is usually based on the history of the injury, it follows that differences of opinion may result in the minds of the medical experts.

Frequently the medical question in a personal injury lawsuit centers around a controversial point in the field of medicine where honest differences of opinion exist.[22] Trauma as the cause of cancer is a good example.[23] Medical men cannot agree on the cause of cancer nor can they agree what role trauma plays in the development or spread of cancer. It is not a difficult problem for an advocate to find a medical expert favorable to his client's position, nor is it difficult for the opposing advocate to find a medical expert favorable to the oposing view. Fortified by the favorable expert in these controversial areas, each advocate uses every legal maneuver at his command to present this medical opinion to the best advantage of his client.[24] This widens even further the gap between the two medical experts' opinions. An attempt to explain the reason for this difference of opinion is often lost in a clamor of objections by the side that would be damaged by the explanation. Many other areas of injury and disease contain similar areas of professional conflict as to etiology.[25]

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[22] Hass, Relationships of Trauma to Injury and Disease: The Pathologist's Approach, 31 Tex. L. R. 747 (1953). Averbach, Causation: A Medico-legal Battlefield, 6 Clev.-Mar. L. R. 209 (1957). Cannon, The Wisdom of the Body (1932). Moritz, Pathology of Trauma (1954). Selye, Stress (1950). Curphey, Trauma and Tumors, 1 J. Forensic Sci. 27 (Jan., 1956). Segerson, Brain Injuries, 24 J. B. A. Kan. 336 (May, 1956). Modlin, Traumatic Neurosis, 24 J. B. A. Kan. 341 (May, 1956). Williamson, Whiplash Injuries, 24 J. B. A. Kan. 328 (May, 1956). Moritz, Trauma and Heart Disease, Physician in the Courtroom 83 (Press of West. Res. Univ., 1954). Todd, Trauma and Coronary Disease, 30 Ohio Bar 17 (Jan. 14, 1957). Hawkins, Trauma and Arthritis, 30 Ohio Bar 76 (Feb. 4, 1957).

[23] McCormick, Trauma and Cancer, 30 Ohio Bar 35 (Jan. 21, 1957). Adelson, Injury and Cancer, Physician in the Courtroom (Press of West. Res. Univ., 1954). Belli, Trial and Tort Trends 440 (1954). Russell and Clark, Medico-legal Considerations of Trauma and Other External Influences in Relation to Cancer, 6 Vanderbilt L. R. 868 (1953).

[24] Steinberg, Expert Medical Testimony, 30 Ohio Bar 149 (Mar. 4, 1957). Longan, Preparation of Medical Testimony, 17 Mont. L. R. 121 (Spring, 1956). Medical Testimony in Parkinsons, 3 Med. Tr. T. Q. 69 (Oct., 1956). Medical Testimony in Epiphyseal Fractures, 3 Med. Tr. T. Q. 37 (Dec., 1956).

[25] Palmer, Traumatic Neuroses, 15 Ohio S. L. J. 399 (1954). Kissane, Injury and Heart Disease—Legal Aspects, 15 Ohio S. L. J. 409 (1954). Wiltberger, The Medico-legal Aspect of Low Back Pain, 15 Ohio S. L. J. 437 (1954). Brown, Injuries to Extremities, 15 Ohio S. L. J. 447 (1954). Friedman, Diabetes and the Law, 85 Med. Times 9 (Great Neck, N. Y., Sept., 1957).

In addition, the medical expert is confronted with the question of probability (legal "causation").[26] In a science which remains inexact in many areas, even though the gaps are rapidly being closed, the medical doctor many times is unable to assign a precise cause to an injury or disability or even to identify a specific injury. In spite of this dilemma, it is explained to him by the plaintiff's attorney that he not only must definitely state with "reasonable medical certainty" that injury exists and what that injury is, but also that it probably resulted from the incident in question and that it probably is permanent. At first glance the medical expert often feels reluctant to attach so much exactness to an inexact area, but by various rationalizations he can arrive at a settlement with his ethical conscience.[27] His lack of actual understanding of the meaning of legal terms such as "probability" may allow him to state in a courtroom what he never could or would state on medical rounds, in a medical lecture hall, at a C. P. C. (Clinical Pathological Conference), or in any medical reports or literature. The confusion and pressure of cross-examination also frequently add to the dilemma. His counterpart on the defense is similarly arriving at a conclusion to this difficult medical question, but with the opposite result. Obviously, in order for the action to proceed, the expert usually can't just say, "I don't know," which is probably the truth in many of these matters. To the moralist it would be just as wrong to say, "I don't know," and let a wronged plaintiff go unrewarded as to testify positively to injuries and probable causation in a controversial area. Frequently the result is that diametrically opposed expert medical opinions are presented at the trial.

The examination and opinion rendered by the medical expert is subject to all the legal manipulations of the counsel calling this doctor to testify.[28] This advocate will present this part of his case in the light which is most favorable to his client.

Cross-examination will add to the complexity of the medical expert's testimony. The opposing advocate will seek to lessen the effect of the doctor's testimony in any way that he can. He may

[26] Koskoff, A Primer for Medical Evidence, 2 Med. Tr. T. Q. 89 (Dec., 1955). Cohen, Doctors and Lawyers in Court, Conn. State Med. J. (Oct., 1952). Brahdy and Kahn, Trauma and Disease 18 (1941). Reed and Emerson, Relation Between Injury and Disease (1938).

[27] Gray, The Requisites and Importance of Sound Medical Examination in Medico-legal Cases, 18 Rocky Mt. L. R. 279 (1946).

[28] Sindell, Preparation of the Medical Aspects of a Personal Injury Case, Law and Medicine Symposium, 3 J. Pub. L. 593 (1954). Kramer, Medical Aspects of Negligence Cases, Practicing Law Inst. (1958).

discredit the expert's opinion by showing that authorities on which the expert relied are of a different opinion. He may attempt to cause the expert to lose his temper and lessen the expert's effect on the jury.[29]

The net effect of the medical experts' testimony is often directly opposed and leaves the jury with the problem of which one to believe. The jury is rarely equipped with sufficient medical knowledge to make an intelligent choice.

Finally, there have been charges that some doctors give testimony favorable to the side by which they are called regardless of the outcome of the examination. This is a charge that is often made but difficult to prove.

Plaintiff's Medical Expert

Plaintiff's medical expert necessarily will testify that he has examined and/or cared for the plaintiff and that in his opinion the plaintiff has suffered certain enumerated temporary and/or permanent injuries probably resulting from the alleged incident.

Plaintiff's doctor is more apt to accept the plaintiff's story as being truthful. The symptoms described when accepted and weighed with the other medical evidence will lead usually to a diagnosis and prognosis favorable to the plaintiff.

Defendant's Medical Expert

Defendant's medical expert usually will testify that defendant has no injuries or that the extent of the injuries are far less than those described by the plaintiff's medical expert. He may also state that the alleged injury could not have been caused by the incident as alleged.

Medical examiners for the defense are aware that they are examining an adverse witness. Objective signs (what the doctor sees) can usually be impartially evaluated. Subjective symptoms (what the patient complains of) require a more careful consideration. It is often difficult to determine if the person being examined really has the symptoms which he describes or if he has them to the degree which he describes. Sometimes the truth can be ascertained by various medical procedures. Symptoms alone are often not enough to convince a defendant's doctor of the injured party's allegations.

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[29] Doctors Talk Back to the Plaintiff's Attorney, 35 Med. Economics 80 (Feb. 3, 1958).

Present Reforms Being Attempted

Ways and means of improving the situations existing in the foregoing areas are manifold. In addition, new approaches are continually being discussed for the present and future. An important reason for the large amount of attention being given this area is a pecuniary one. Personal injury litigation has grown to be a multi-billion dollar industry. National Safety Council figures place the cost of accidental injuries at eight billion dollars each year.[30] Both sides of the legal controversy, plaintiff's counsel and defendant's counsel, have evolved as large, complex organizations intent on furthering their respective causes.

Insurance companies and other defense minded organizations publish large amounts of literature to educate and keep defense attorneys and associated personnel up to date. Plaintiff's attorneys have formed an organization which carries on seminars, publishes literature, etc., all with the purpose of more effectively organizing and educating the plaintiff's attorney. Some defense attorneys also participate in this latter organization. Symposia are held at various law schools at which many of the best legal and medical minds in the field of legal medicine participate.[31] Some law reviews have devoted much of their space to a review of the problems in the field.[32] The purpose of each participant in these areas seems to be twofold. Primarily, the participant desires to further the interests of the particular side of the field which he represents. Secondarily, this participant seeks to establish better relations between the various areas of the field and higher standards of conduct throughout. Naturally an advocate will spend much time and effort furthering his own particular position and will be extremely hesitant and reluctant to take up and accept reforms or changes which compromise or infringe upon his position no matter how correct or proper they might be. This applies to both sides of the medicolegal arena.

In spite of this problem certain significant steps have been taken. In New York a panel of medical experts has been made

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30 36 Cornell L. Q. 203 n. 1 (1951). Horovitz, *op. cit. supra* n. 4.

31 Medico-legal Aspects of Personal Injury Actions, 23 Tenn. L. R. 6 (Feb., 1955). Law-Science Symposium, 31 Tex. L. R. 6 (June, 1953). *Op. cit. supra* n. 6. Law and Medicine—A Symposium, 3 J. Pub. L. 2 (Fall, 1954).

32 Wellenborg, Law and Medicine—A Report on Interprofessional Relations, 15 Ohio S. L. J. 453 (1954). See many past issues of the Cleveland-Marshall Law Review which has devoted a large portion of its space to medicolegal problems on an impartial and highly educational basis.

available to the court.[33] This panel assists the judge by giving impartial and unbiased medical opinions at pretrial hearings. This information helps greatly to resolve differing opinions as to the nature and extent of injuries. Similar medical panels have been established in California and Maryland.[34] These recent attempts to more effectively incorporate medical opinion into legal procedure have received widespread publicity and much comment from all parties concerned. Everyone is watching closely the overall results.

Medical associations, both local and national, have paid increasing attention to the problems involved. One recent step taken was the printing in a medical magazine of the testimony of doctors in recent trials. This provided a means for the doctor to see what was said and how typical trials were carried on. In addition, more educational material is becoming available to help acquaint the doctor with his role in medicolegal proceedings.[35]

Law-medicine centers have been set up at some of the larger universities, where the complexities of legal medicine receive direct attention. Lawyers are taking courses in phases of medicine pertinent to their practice. Doctors prepare lectures keyed to the lawyer. In other courses the roles are reversed and the lawyer teaches the doctor.

The over-all purpose of these undertakings seems to be an attempt to bridge the gap between the fields of law and medicine in the greatly expanding fields of personal injury, workmen's compensation, and malpractice litigation.[36]

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[33] Standards of Practice for Doctors and Lawyers Adopted by the New York State Bar Association and Medical Society of the State of New York, 57 N. Y. State J. M. 2867 (Sept. 1, 1957). The Medical Expert, 257 N. Eng. J. M. 1220 (Dec. 12, 1957). Abbott, Lawyer-Physician Relations in Accident and Compensation Cases, 47 J. Iowa Med. Soc. 717 (Dec., 1957). Seiff, How to Improve Doctor-Lawyer Relations. I. The Lawyer's Point of View, 58 N. Y. State J. M. 421 (Feb. 1, 1958). Raiford, The Interprofessional Code of North Carolina for Attorneys and Physicians, 18 No. Car. M. J. 139 (May, 1957). Thorpe, The Medico-legal Interprofessional Code and Its Practical Application in Personal Injury Litigation, 17 No. Car. M. J. 564 (Dec. 1956). Oleck, A Cure for Doctor-Lawyer Frictions, 7 Clev.-Mar. L. R. 473 (Sept. 1958).

[34] Niles, Impartial Medical Testimony (Baltimore Plan), 29 Del. M. J. 247 (Oct., 1957).

[35] Regan, The Importance of Undergraduate Medical Education in the Field of Legal Medicine, 10 Med. Arts & Sc. 9 (1956). And see n. 32.

[36] McCormick, *op. cit. supra* n. 20. Hall, A Proposal to Introduce Forensic Science in the University Curriculum, 42 J. Crim. L. 549 (1951). Levinston, Value of Medicolegal Symposia in Modern Forensic Medicine, 41 J. Crim. L. 815 (1951). Richardson, The Improvement of Justice With the Aid

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Probable Course of Development of Medical Law

It seems a foregone conclusion that the over-all growth of the areas involved in legal medicine will continue. Publicity in newspapers, on radio and television has made, and will continue to make, the public aware of the problems. Medical testimony is more often being given by "expert" medical experts, doctors who have been in court many times and who are more or less familiar with court procedures, medical testimony, and cross-examination. This trend increases as medical testimony becomes more refined and complex. These "expert" experts are more adept at avoiding the pitfalls of cross-examinations, etc., than the more inexperienced medical expert.

Specific areas of law involving legal medicine hold important considerations for the future both in the field of law and in the field of medicine. Personal injury litigation has dwarfed other litigation in number of lawsuits filed in recent years. Sixty to eighty per cent of pending civil actions involve personal injury. Liability insurance has become a multi-billion dollar industry. The number of personnel and degree of organization required to handle this greatly increasing volume of activity is obvious.

Hospitals are facing a period when the immunity which has long protected them from many forms of legal action is being reviewed and altered.[37] The non-liability of the charitable organization, long a protective cloak in the law, has been abolished in many jurisdictions and is under critical review in many others.

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of Science and Expert Witnesses, 1951 Wash. U. L. Q. 498 (1951). Smith, Interactions of Law and Science, 24 No. Car. L. R. 104 (1946). Smith, Scientific Proof and Relations of Law and Medicine, 10 U. Chi. L. R. 243 (1943). Articles by Warren, Coffman, Pound, Regan, and Kirtland in: 4 Annals of Western Med. and Surg. 437 (1950). Articles by DeLacy, Hawkinson, Hammer, Smith, and Beutel in a symposium on: The Doctor in Court, 10 J. Omaha Midwest Clinical Soc. 1 (1949).

[37] Aikman, Tort Liability of Charitable Institutions, 9 U. Pitt. L. R. 253 (1948). Grubb and Reuss, Contracts by Liability Insurer Not To Raise the Defense of Charitable or Governmental Immunity, 14 Ins. Counsel J. 168 (1947); also see: 51 Mich. L. R. 309 (1952); 13 Ohio S. L. J. 291 (1952); 5 U. Fla. L. R. 213 (1952). Brannon, Hospital Immunity, 6 Clev.-Mar. L. R. 243 (1957). Scott and Smith, Changes in Hospital Liability, 58 Am. J. Nurs. 68 (Jan., 1958). Hayden, The Law of Hospital Liability Is Settled; Until Something Happens to Unsettle It, 90 Mod. Hosp. 68 (Jan., 1958). Governmental Hospitals; Liability for Negligence of a Nurse; Respondeat Superior, 164 J. A. M. A. 799 (June 15, 1957.) Garber and Tyree, Liability of Hospitals for Negligence, 88 Mod. Hosp. 84 (May, 1957). Liability of a Hospital for the Acts of Its Employees, 58 N. Y. State J. M. 584 (Feb. 15, 1958). Governmental Hospitals: Liability for Negligence of Employees, 165 J. A. M. A. 65 (Sept. 7, 1957). See also other articles on this subject elsewhere in this issue of this Review.

Malpractice, a dreaded word to both doctor and lawyer, is a markedly expanding area to be watched closely by both the legal and medical professions. The majority of the situations do not involve the obvious wrongdoer, but rather relate to questions of negligence on the part of the honest practitioner. The medical doctor is frequently forced to render treatment in precarious situations, often under adverse circumstances. He often is faced with unfavorable odds in medical procedures which must, nevertheless, be undertaken since they are the only procedures available. What is accepted as excellent care in the early morning emergency room often becomes flagrant neglect in the cold light of the courtroom. The ethical and moral standards of medical doctors have been kept very high by the medical schools, hospitals, and medical organizations of the country, both local and national. High standards of training and stringent requirements of proficiency buttress every medical specialty, including the general practitioner. However, modern medicine has introduced many new procedures and methods which not only are both extremely helpful but also more dangerous to carry out. The many people who are helped by these recent innovations are not seen in the courtroom, but the few who are injured often are. These latter cases are, unfortunately, part of the risk involved, and the doctor must weigh this risk in many of his daily activities and make recommendations accordingly. It is both unfair and unrealistic to hold a doctor responsible for the percentage of failures which are part of many of today's accepted medical tests and treatment.

Many times the best medical procedures do not achieve a favorable result. Although there has been no negligence, there may be a poor result. Certain courts have allowed the doctrine of "res ipsa loquitur" (with reference to cases where mere proof that an accident took place is sufficient under the circumstances to throw the burden upon the defendant to go forward in proving that it was not due to his negligence) to be applied in some medical malpractice cases.[38] There therefore is a temptation to view a poor result as an indication of someone's negligence. A sincere attorney, at best only poorly versed in medical knowledge but representing a disgruntled client, is hard put to decide on a proper legal course of action. It seems inevitable that a closer, better

[38] Morris, When Law Is Perverted by Sympathy, 35 Med. Economics 96 (April 28, 1958). Morris, "Res Ipsa Loquitur," Liability Without Fault, 163 J. A. M. A. 1055 (Mar. 23, 1957).

understanding between the fields of medicine and law must come about.[39] This understanding would lessen or avoid the misunderstandings increasingly present today.

Further Suggested Reforms

Professional finding of detailed scientific facts seems to be the logical step for the future.[40] The jury system has been an essential and important part of our legal system, but in the last fifty years the increased complexity of many trials has rendered certain forms of the jury system inadequate and outmoded.[41] A jury of laymen is not qualified to decide the existence and prognosis of a given complicated injury even with the testimony of medical experts explained in supposedly simple terms.[42] In addition, the usual trial finds that medical experts disagree on the injuries and prognoses involved. In view of this, is it reasonable to expect a lay jury to decide which expert is right? The medical testimony is often designed to impress or influence the jury rather than to give an accurate portrayal of medical fact. In addition, the complexities of medicine (as well as the complexities of many other scientific fields) increase daily.[43] Many medical procedures and techniques have become too complex for the layman and for that matter the brother medical man from another specialty, to accurately understand. If the psychiatrist cannot understand the intricate details of the thoracic surgeon's procedures and vice versa, how can a medical layman

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[39] Elkin, A Symposium on Law and Medicine, 3 J. Pub. L. 289 (1954). Shindell, *op. cit.* supra n. 13.

[40] Pound, A Ministry of Justice as a Means of Making Progress in Medicine Available to Courts and Legislatures, 10 U. Chi. L. R. 323 (1943). Morgan, Suggested Remedy for Obstructions to Expert Testimony to Rules of Evidence, 10 U. Chi. L. R. 285 (1943). Smith, Cooperation Between Law and Science in Scientific Proof, 19 Tex. L. R. 414 (1941). Smith, *op. cit. supra* n. 36.

[41] Frank, Law and the Modern Mind (1930). Frank, Something's Wrong With Our Jury System, 126 Colliers 28 (Dec. 9, 1950). Frank, "Short of Sickness and Death"; A Study of Moral Responsibility in Legal Criticism, 26 N. Y. U. L. R. 545 (1951). Hoffman and Bradley, Jurors on Trial, 17 Mo. L. R. 235 (1952). Nardi, Excessive Personal Injury Awards: A Problem and a Recommendation, 1 Clev.-Mar. L. R. 23 (1953). Contra: Goodman, In Defense of Our Jury System: A Reply to Jerome Frank, 127 Colliers 24 (Apr. 21, 1951). Hulen, Twelve Good Men and True: The Forgotten Men of the Courtroom, 38 A. B. A. J. 813 (1952). Wigmore, A Program for the Trial of Jury Trial, 12 Am. Jud. Soc. 166 (1929).

[42] Regan, *op. cit. supra* n. 3.

[43] Pope, The Presentation of Scientific Evidence, 31 Tex. L. R. 794 (1953). Beveridge, The Art of Scientific Investigation (1950). Wigmore, The Science of Judicial Proof, Section 221 (3rd ed. 1937). Smith, *op. cit. supra* n. 36.

with little or no knowledge of medicine hope to decide medical facts as a juror? The answer is simple, he cannot. Except for the more obvious medical entities such as amputation or death, the juror usually cannot accurately decide medical fact, even with the aid of medical experts. The solution would seem to be to have detailed medical disagreements resolved by medical panels. This finding of medical fact would be introduced as part of the evidence in the trial. Whether it would be absolute or subject to cross-examination and/or rebuttal is a question to be decided by legal minds after careful and extended deliberation. It would seem that the future effectiveness of the jury system requires that complex questions involving any profession should be decided by impartial panels of that profession under the supervision of the court. The frailty of the present system is that opposing counsel bring in opposing experts and the jury is left with the problem of ultimately deciding complex questions of fact for which it has inadequate knowledge and understanding. This statement is not meant to belittle the juror. He makes a sincere effort to do the best that he can under the circumstances. It should be the combined responsibility of the presiding judge and counsel to recognize and agree that questions of professional fact too complex for the jury to decide should be decided by a panel composed of mutually acceptable members of that profession. The medical panels of New York, Baltimore, and Los Angeles are steps in the right direction.

Pitfalls to be avoided are the reforms advocated by individual segments of legal medicine without the concurrence of other segments. Reforms suggested by the National Association of Claimants' Compensation Attorneys will almost certainly be advantageous to that group. Insurance groups and conservative bar associations, which often seem to be dominated by defense counsel firms, will obviously advocate reforms which are in their best interests. The true reform is that reform arrived at by concurrence of all factions after cooperative discussion by all.[44] It is folly to advocate improvements in legal procedure which are bitterly opposed by certain factions. It would be much more sensible to debate and modify these reforms on common grounds so that a majority of all factions will accept them. When changing times make certain inadequacies in the law obvious, it be-

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[44] Gerber, Expert Medical Testimony and the Medical Expert, Physician in the Courtroom 67 (Press of West. Res. Univ., 1954).

hooves the profession to change according to the dictates of professional conscience rather than of personal gain or advantage. Claims for personal injury, workmen's compensation, and malpractice will go on whether or not changes are made, but the standards of professional performance certainly can rise much higher if intelligent changes are made.